

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

No. **75-670** 1

ACCURACY IN MEDIA, INC., *Petitioner*
v.
NATIONAL BROADCASTING COMPANY, INC., *Respondent*
and
FEDERAL COMMUNICATIONS COMMISSION,
Respondent on Side of Petitioner

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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November 5, 1975

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Petitioner, Accuracy in Media, Inc. (AIM), respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on July 11, 1975.

OPINIONS BELOW

The Memorandum Opinion and Order of the Federal Communications Commission (Commission or FCC) is reported at 44 F.2d 1027 (1973). The initial opinions and judgment of the Court of Appeals were entered

on September 27, 1974. On December 13, 1974, those opinions and judgment were vacated and the matter was set down for a rehearing *en banc*. On March 18, 1975, the order granting rehearing *en banc* was in turn vacated and the original opinions and judgment were reinstated. On July 11, 1975, the panel before which the case was heard initially vacated its own reinstated opinions and judgment of September 27, 1974; and re-⁴³⁻²¹³manded the case to the FCC. All of the Court of Appeals' rulings are reported at 516 F.2d 1101 and are reprinted in the appendix to this petition.

JURISDICTION

The judgment and opinions of the Court of Appeals were entered on July 11, 1975. A timely petition for rehearing was denied on August 7, 1975. This Court has jurisdiction under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals permitting vacation of the FCC order and dismissal of the AIM Fairness Doctrine complaint is in direct conflict with this Court's decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) and with the provisions and the legislative intent of the Federal Communications Act?

2. Whether the Fairness Doctrine applies to television news documentaries or investigative journalism as those terms were employed by the National Broadcasting Co., Inc. (NBC) and the Court of Appeals?

3. Whether the Court of Appeals improperly abdicated its decision-making function without due regard

for the rights of litigants by permitting the FCC to vacate its order and dismiss the AIM complaint?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28: § 2342(1)

Jurisdiction of Court of Appeals

The court of appeals has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

- (1) all final orders of the Federal Communications Commission made reviewable by section 402 (a) of title 47;

United States Code, Title 28: § 2348

Representation in Proceeding; Intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

United States Code, Title 47: § 315 (a)

Candidates for Public Office—Equal Opportunities Requirement; Censorship Prohibition; Allowance of Station Use; News Appearances Exception; Public Interest; Public Issues Discussion Opportunities

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

- (1) bona fide newscast,
- (2) bona fide news interview,
- (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
- (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate

in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

STATEMENT OF THE CASE

On September 12, 1972, NBC presented a one-hour television program entitled "Pensions: The Broken Promise" (Program). The program dealt with the private pension system in the United States and the necessity for its reform through federal legislation.

On November 27, 1972, AIM filed a complaint with the FCC charging that NBC had violated the FCC's fairness doctrine by presenting a program devoted virtually entirely to an indictment of private pension plans. The AIM complaint asserted that this was a controversial issue of public interest which required a balanced presentation found wanting in the NBC broadcast. NBC conceded that it had not presented other programs dealing with this subject and had no plans to do so.

Following a review and analysis of the transcript of the program and the submissions of AIM and NBC, the staff of the FCC determined that the "overall thrust" of the program was, as AIM had asserted, general criticism of the entire pension system, accompanied by proposals for its regulation. It considered these to be controversial issues of public importance which triggered an obligation on NBC's part to present contrasting viewpoints. The latter obligations, in the staff's view, had not been met.

NBC applied to the Commission for review, arguing that the telecast had dealt solely with the pitfalls and failures of some private pension plans. The staff find-

ings were confirmed by the Commission. Based on its review of all of the relevant facts and circumstances, the FCC concluded that NBC's judgments regarding the subject matter of the program were not reasonable. The network was ordered to meet its fairness doctrine obligations by affording a reasonable opportunity for the presentation of views contrasting to those presented on the program.

NBC petitioned the United States Court of Appeals for the District of Columbia Circuit for judicial review of the Commission's decision under the provisions of 47 U.S.C. § 402. AIM was permitted to intervene and participate as a party in the appellate proceedings. On September 27, 1974, the Court of Appeals, by a 2-1 decision, reversed the agency ruling and remanded the case with instructions that the FCC order was to be vacated.

AIM petitioned for a rehearing *en banc*. On December 13, 1974 that petition was granted. The panel's opinions and judgment were vacated. Following submission of briefs by all parties, but prior to the date of the rehearing, the FCC suggested to the Court of Appeals that the matter had become moot. The Commission argued that enactment of pension reform legislation subsequent to the telecast had mooted the controversial issues and eliminated the necessity for further review. On March 18, 1975, without addressing the question of mootness, the *en banc* court vacated its December 13, 1974 order, reinstated the opinions and judgment of the original panel and referred the suggestion of mootness to that panel. There was no opinion explicating the order. On June 2, 1975, however, Chief Judge Bazelon filed a dissenting opinion.

On June 16, 1975, AIM applied to this Court for an extension of time within which to file a petition for a writ of certiorari. An extension was granted. Thereafter, on July 11, 1975, the original panel vacated the reinstated opinions and judgment and remanded the case to the FCC "in order for it to vacate its order of December 3, 1973, and to dismiss the complaint which led to the order." AIM petitioned for a rehearing. The rehearing was denied on August 7, 1975.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW FAILED TO ADHERE TO THE DECISION OF THIS COURT IN *RED LION BROADCASTING CO. v. FCC*¹

A. Introduction

By its contradictory actions the Court of Appeals has achieved one of two possible results in this matter. Neither is consonant with a previous decision of this Court; both require reversal.

The Court of Appeals has either abdicated its responsibility by refusing to decide fundamental questions squarely before it or it has attempted to impose its fairness doctrine views on the agency, the industry and the public *sub rosa*, in a manner designed to frustrate subsequent judicial review. Both results are in direct conflict with the straightforward language of this Court in *Red Lion Broadcasting Co. v. FCC*, *supra*.

B. The Court of Appeals Improperly Refused To Consider the Merits

Unlike its earlier decision of September 27, 1974, the July 11, 1975 order of the Court of Appeals did not purport to reach the merits of this controversy. Al-

¹ 395 U.S. 367 (1969).

though the animated dispute among the judges which surfaced in the first decision continued unabated in the last, these strongly divergent views on the merits—perhaps for this reason—were not offered as the basis for the Court's action. At the same time the Court did not ascribe its indecisiveness to the mootness of the issues presented.

It was, in fact, the mootness issue alone which was resolved conclusively. In its suggestion of mootness the FCC took the position that enactment of legislation dealing with private pension plans following the program mooted the controversial issue. That legislation was enacted prior to the issuance of the panel's original decision. In that decision the panel adverted specifically to the new legislation and concluded that its passage did not moot the issues raised. When the *en banc* Court referred the FCC's suggestion of mootness back to the original panel in March, 1975, the panel reaffirmed its earlier conclusion. Judge Fahy and Judge Leventhal each refused to accept the suggestion of mootness. Judge Leventhal explicated at length his views on the clear inapplicability of the mootness doctrine.

It is not remarkable that neither the *en banc* Court nor the panel found this controversy to be moot. Their unwillingness to conclude that the issues were no longer worthy of resolution was consistent with a long line of decisions dealing with similar questions of grave and continuing public importance. *See e.g., DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911). Both NBC and AIM opposed vigorously the FCC's suggestion, which came after the agency had ignored several more

timely and more logical opportunities to raise the same point.

What is remarkable is that the Court of Appeals, having declined the opportunity to invoke the mootness doctrine, nonetheless refused to consider the merits of the dispute. If the issues were not moot, as it decided they were not, then they had to be, as asserted by AIM and NBC, continuing, recurring, controversial and of extreme public importance. The issues were not treated in this manner. The issues were not treated at all.

The inaction of the Court is illustrated in the three diverse opinions accompanying the July 11, 1975 order. Judge Fahy described the true intentions of the Commission to which the Court ultimately, albeit unenthusiastically, acceded:

The Commission seeks the remand on the theory of mootness. It is clear, however, that this theory is simply the medium advanced by the Commission to enable the case to be ended without a definitive decision on the merits. *National Broadcasting Co., Inc. v. FCC*, 516 F.2d 1101, 1182 (D.C. Cir. 1975).

It was agreeable to Judge Fahy that the merits not be reached. Threading his way between mootness and the merits he contrived to return the case to the FCC as if the protracted litigation had not taken place at all.

Judge Leventhal, who dealt in great detail with the merits of the case in his original opinion, refrained from doing so again, but not because his views had changed:

Judge Fahy has written an opinion which remands the proceeding to permit the FCC to vacate

its order in the exercise of its discretion, on an equitable doctrine rooted in considerations of administrative and judicial discretion. While I disagree as to this course, I do not undertake to enlarge on my reasons, for this disposition ordered by Judge Fahy is not as objectionable as a dismissal for mootness. *Id.* at 1201.

To avoid a decision on mootness Judge Leventhal joined in a resolution structured by Judge Fahy to avoid a decision on the merits.

Judge Tamm, who alone viewed the controversy as moot, alone took a stand on the merits, a stand completely contrary to the views expressed by Judge Leventhal in the September, 1974 opinion. To complete the web of confusion spun by the Court it must be recalled that Chief Judge Bazelon had expressed his vigorous, and separate, views on the merits when the full court reversed itself on the question of an *en banc* hearing. *Id.* at 1156.

The inability of a Court of Appeals to achieve a coherent resolution of a particular issue is not, without more, a sufficient basis for this Court to grant certiorari. The inability of this Court of Appeals to resolve this issue is distinctive, however, for several important reasons.

As a threshold consideration this case involves novel and unresolved questions in one of the most sensitive and highly-publicized areas of broadcasting. It is, as both Judge Tamm and Judge Leventhal emphasized, "... the first case in which a broadcaster has been held in violation of the fairness doctrine for the broadcasting of an investigative news documentary that presented a serious social problem." *Id.* at 1200. Television news documentaries and other similar programs

invite intense public reaction because of both the provocative subjects explored and the dramatic manner in which they are presented. This kind of broadcasting carries with it a singular cloak of authenticity and it not infrequently seeks to persuade or excite or convince. It is not merely passive entertainment.

Secondly, this form of journalism and the questions it evokes in this case emphasize the need for the fairness doctrine and the importance of its thoughtful and consistent application. These broadcasts explore topics which are, almost by definition, newsworthy. Unlike newscasts, however, in which contemporaneous events are merely filtered by the editorial judgments of the broadcaster, documentaries are conceived and initiated by the broadcaster and packaged—researched, scripted, filmed, edited, revised and sold—around a particular point of view. The impact of these presentations is carefully designed and completely intentional. When the full force of the imagination, skill and technical competence of a network propels an idea into the public's perception, the balancing function of the fairness doctrine takes on critical importance.²

A third distinguishing characteristic of this case is that the type of programming involved here has unique appeal for the broadcast industry. It permits licensees to present programs which have both entertainment and public service value. Documentaries are seldom winners in the ratings contest, but they are prestige-earning products which have significant influence on public opinion. Their importance to the in-

² See pp. 119-122 of the Joint Appendix filed in the Court of Appeals for a description of NBC's prodigious efforts in producing "Pensions."

dustry can be measured by the degree and intensity of industry participation, direct and indirect, in this lawsuit.

The most unique element of this case is, however, the surprising refusal of the Court of Appeals to apply the definitive standards of *Red Lion*. News documentaries were not before this Court in that case. Nevertheless, the detailed historical analysis and the precise allocation of responsibility under the fairness doctrine contained in that opinion made available to the Court of Appeals in this case sufficient guidelines for the resolution of the issues defined by the parties and the Commission. In declining to reach the merits the Court of Appeals turned its back on *Red Lion*. It went beyond that. The Court failed to understand the public information function of the fairness doctrine, it refused to acknowledge the "ultimate arbiter" role of the FCC in fairness doctrine determinations, and it misapprehended the boundaries of judicial review.

The value of *Red Lion* is fatally circumscribed when its mandates are plainly applicable yet clearly ignored. It follows that the effectiveness of the fairness doctrine itself in guaranteeing the crucial right of the public to "suitable access to social, political, esthetic, moral and other ideas and experiences" is critically diminished. 395 U.S. at 390.

C. The Court of Appeals Rejected the Principles of *Red Lion*

NBC and many of those who have supported its efforts below want nothing less than the complete and final abrogation of the fairness doctrine.³ Barred by

³ Reuven Frank, President of NBC News, the news division of NBC, has stated in the record below that, "The Fairness Doctrine is not included in the argot of television journalists." Court of Appeals Joint Appendix p. 129.

Red Lion from achieving or even seeking this result directly, the network launched a collateral attack on the doctrine by suggesting that the Court of Appeals carve out an exception to the application of the doctrine for news documentaries and similar programs. The "exception" would destroy the rule.

Nothing in *Red Lion* suggests that NBC's proposed fragmentation of the fairness doctrine is acceptable or permissible. Nothing suggests that this Court intended anything other than a uniform and forceful application of the doctrine to all aspects of broadcasting, however characterized by the networks.

In its efforts to protect what it perceives to be its own limitless First Amendment rights at the expense of the First Amendment rights of the American viewing public, NBC has enlisted the assistance of a Court of Appeals which shares a similar disregard for *Red Lion* and a similar lack of understanding for its meaning and its merit. But if NBC in pursuing this matter considered itself free somehow to ignore *Red Lion*, the Court of Appeals in deciding this matter had no such freedom. It was not the function or the privilege of the Court to mutilate by exceptions the intended effect of the doctrine. For the purpose of the Court of Appeals the issues raised by NBC, however glitteringly described, were resolved by *Red Lion*, which upheld the fairness doctrine on the basis of both its intrinsic value and the affirmative congressional endorsement which it has received. The Court of Appeals has refused to operate within these boundaries. Its decision, however it may be characterized technically, is a refutation of *Red Lion* and a rejection of the fairness doctrine.

Judge Tamm provides the most succinct and the most telling description of his brothers' efforts:

"I must conclude that the majority's rationale of Commission error was a ploy to stalk bigger game. Unfortunately, only one reason explicates the majority's action—an obvious antipathy to the fairness doctrine suggesting that, given a free hand, it would have struck down the doctrine as unconstitutional. However, since the Supreme Court unanimously upheld the fairness doctrine in *Red Lion Broadcasting Co. v. FCC*, *supra*, [footnote omitted] the majority could not do so directly, and thus, did so indirectly. It so limited the doctrine that, as a practical matter, the licensee's obligation of fairness would have been a dead letter." 512 F.2d at 1191.

He was, in that passage, describing his view of the original panel decision of September 27, 1974. Judge Leventhal's July 11, 1975 opinion did nothing to alter that view. The latter opinion was even more revealing. Judge Tamm noted with considerable vigor that:

In his opinion today, Judge Leventhal now has dropped all protective coloration and explicitly states that the case *sub judice* merits an exception to the normal standard of judicial review of agency action because the licensee's journalistic discretion is 'suffused with First Amendment values' Judge Leventhal's restatement of the principles upon which he relied further strengthens my belief that the majority impermissibly attempted to avoid *sub silentio* congressional and Supreme Court judgments affirming the efficacy of the fairness doctrine. 512 F.2d at 1188, n. 2.

Judge Tamm has described accurately the purpose and the effect of the September 1974 opinions and judgment. He appears to believe that this impermis-

sible result has been eliminated by the action of the panel in July 1975. This is not the case.

The September opinion rejected *Red Lion* on its face by reordering the review structure and reversing the historical roles of the agency and the court. That decision was wrong but it would have permitted direct and meaningful review. The July opinion achieved the same result on the law, but in an obscure and oblique fashion that could have had no other purpose than to thwart subsequent appeal.

When the Court's procedural maze is solved the practical consequences are these: The majority of the panel has expressed its view that the Commission was wrong and that television documentaries are, in effect, exempt from the fairness doctrine because of First Amendment considerations. The majority has never retreated from this view on the merits. Nor has the majority agreed that the issue is moot. It has remanded the case to the FCC in order for the FCC to vacate its order and dismiss AIM's complaint. The FCC urged dismissal, in the twilight of review, on the ground of mootness. The Court has said the complaint is not moot, but dismiss it anyway.

The Court of Appeals has rejected unequivocally the principles of *Red Lion*, has ruled that the controversy is not moot, and has ensured a result at the agency level which is consistent with the Court's views. It would be impossible to design a result which would more effectively preserve and dramatize the Court's dissident views on the fairness doctrine while insulating them from review.

If the Court's device succeeds several intolerable results must follow. *Red Lion* will have been neu-

tralized and application of the fairness doctrine will be crippled or eliminated entirely. It is highly unlikely that other fairness complaints will be filed or pursued.⁴ AIM, to persevere in its public interest efforts, will have to await the FCC's dismissal of its complaint and begin anew in the Court of Appeals a quest to which it has already devoted three years and a large portion of its modest resources. It is inconceivable that such a perverse result can be permitted to stand.

II. AIM'S RIGHTS AS A PARTY HAVE BEEN VIOLATED

AIM, as an intervenor in this action, had all of the rights of a party. *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965). As a direct consequence of the action of the Court of Appeals, however, AIM has had imposed upon it, without its consent, a non-judicial resolution of this matter agreeable—for widely divergent reasons—to the other two litigants. Its rights as a party have been extinguished by the timidity of the agency and the complaisance of the Court.

Under the provisions of 28 U.S.C. 2342, the Court of Appeals had jurisdiction to enjoin, set aside, suspend or determine the validity of all final orders of the FCC. 28 U.S.C. 2348 makes the Attorney General of the United States responsible for and gives him control over the interests of the Government in all such proceedings. The Attorney General did not elect to participate in this proceeding in the Court of Appeals. The

⁴ Although the September 1974 order has been vacated it has been printed in the official reporter and stands as a formidable inhibition to anyone contemplating a fairness doctrine challenge. It will have an even more dramatic impact on the FCC, which, by its suggestion of mootness below, has already indicated its clear disinclination to challenge the Court of Appeals' obliteration of the doctrine.

agency was his surrogate and represented the interests of the Government throughout.

Organizations such as AIM, whose interests are affected by an agency order, may, as AIM did, intervene in any review proceeding. Having intervened AIM was entitled as a matter of law to prosecute, defend or continue the proceedings without regard to and unaffected by any of the actions of the Attorney General or its surrogate. Moreover, and most importantly for purposes of this petition, the Government, whether acting through the Attorney General or, as here, through the agency, "may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor." 28 U.S.C. 2348.

The Commission's suggestion of mootness, which ultimately precipitated the July, 1975 decision, was, as Judge Fahy correctly perceived, "simply the medium advanced by the Commission to enable the case to be ended without a definitive decision on the merits." 512 F.2d at 1182. He and Judge Leventhal permitted the proceeding to be discontinued on this basis, by remanding it to the FCC for its dispositive final action. The Government sought and obtained discontinuance of this matter without the consent and over the vehement and unremitting objection of the intervenor, AIM.

By acquiescing in the FCC's proposal the court permitted a result proscribed by 28 U.S.C. 2348. The Government may not do what it purported to do below. Most assuredly it may not do so under the auspices and with the express imprimatur of the Court of Appeals. In countenancing this result the Court overrode specific legislation protecting the rights of intervenors and ignored the intent of Congress to avoid precipitous abandonment of private parties involved in public litigation.

There is no right to intervene if the intervenor is wedded absolutely to the judgment of the agency-party to the dispute. There would be no point or purpose served in intervention under such ground rules.

AIM, as other public interest groups, has limited financial resources. Placing economically formidable but legally insignificant obstacles such as the July order in its path insures that its good-faith efforts and its impact will be reduced if not eliminated. Whatever view the Court of Appeals or the other parties may have had of AIM's goals or its philosophy, it is generally agreed that the presence of public interest groups such as AIM in the public conscience and in the administrative process is constructive and consonant with the purposes of the First Amendment.

CONCLUSION

For the reasons stated above petitioner respectfully requests that this petition be granted.

Respectfully submitted,

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